

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RENEE MARIE LESSARD,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 263727

Grand Traverse Circuit Court

LC No. 05-009704-FH

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions of larceny in a building, MCL 750.360, and possession of controlled substances, namely oxycodone (Oxycotin) and hydrocodone (Vicodin), MCL 333.7403(2)(b)(ii). She was sentenced to three years' probation with the first three months to be served in jail. Because defendant was not denied her constitutional right to confrontation nor was she denied her due process rights against self-incrimination, we affirm.

Defendant's convictions arise out of the theft of oxycodone and hydrocodone from the French Manor Limited ("French Manor"), an adult foster care home where defendant was employed. These medications were prescribed to a resident of the facility in October 2004, and, as a resident caregiver at the facility, defendant had access to the medications. Defendant worked from 3:00 to 11:00 p.m. on October 24, 2004, and was relieved by a fellow employee, Tara Dent, who arrived for work at 11:00 p.m. that night. Defendant and Dent followed the procedure of counting all narcotic medications at the shift change to ensure an accurate count. Sometime after 2:00 a.m., Dent noticed that the medications had been taken out of the cupboard where they were kept and that someone had rummaged through her purse. She observed that a quantity of oxycodone and hydrocodone was missing, as well as \$50 and a compact from her purse. A sliding-glass door located beside the medicine cupboard was open and Dent noticed wet footprints on the floor¹. Upon police questioning about the theft, defendant ultimately admitted taking the medication and using it for her own personal use.

¹ It had been raining on the night of the incident.

On appeal, defendant first argues that she was denied her constitutional right of confrontation when the trial court admitted Dent's preliminary examination testimony after Dent did not appear at trial and could not be located. We review a trial court's decision regarding the admission of evidence for an abuse of discretion, but we review de novo a trial court's decision on a preliminary question of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Further, we review de novo constitutional questions regarding a defendant's right of confrontation. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Both the Michigan and United States Constitutions guarantee a criminal defendant the right to confront the witnesses against her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Sixth Amendment Confrontation Clause bars testimonial statements of a witness not present at trial unless the witness is unavailable to testify, and the defendant had a previous opportunity for cross-examination. *Id.* at 53-54. It is undisputed that preliminary examination testimony is testimonial in nature. *Id.* at 51-52. Thus, Dent's preliminary examination was admissible only if she was unavailable at trial and defendant had a prior opportunity for cross-examination. Defendant does not dispute that Dent was unavailable at trial, but rather, focuses on her prior opportunity for cross-examination.

MRE 804(b)(1) provides that, "where a witness is unavailable, testimony given by the person at an earlier hearing is not excluded by the hearsay rule if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination." *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). Defendant argues that the motives for cross-examining Dent at defendant's preliminary examination were different from the motives for cross-examining Dent at trial. Whether a party had a similar motive to develop a witness's testimony through cross-examination at a prior hearing depends on the similarity of the issues regarding which the testimony is presented in each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

Here, the prosecutor elicited Dent's testimony at both proceedings to establish that defendant committed the thefts of the medications. Defendant argues that, by the time of trial, her theory of defense focused on the fact that only two employees were on duty and in close proximity to the medications. This fact was known, however, at the time of defendant's preliminary examination, and defense counsel cross-examined Dent regarding the time that she arrived for work, the procedure of counting the medications at the shift change, and whether the cupboard where the medications were kept was locked.

Defendant also argues that although trial testimony indicated that French Manor's policy was to keep the medicine cupboard locked at all times, she never had the opportunity to cross-examine Dent regarding Dent's testimony that the cupboard was not locked on the night of the offense. At the preliminary examination, however, Kelly Cassidy, the manager of French Manor, testified that the medicine cupboard was supposed to be locked at all times, although it was not locked on the night of the offense. Defense counsel also had the opportunity to question Dent concerning this issue at the preliminary examination. Accordingly, because defendant's motives for cross-examining Dent at the preliminary examination and at trial were the same and defendant had a prior opportunity to develop Dent's testimony through cross-examination, the admission of Dent's preliminary examination testimony at trial did not violate defendant's right of confrontation. *Crawford, supra* at 53-54.

Defendant next contends that she was denied her state and federal due process rights against self-incrimination when the trial court denied her motion to suppress her statement to the police on the basis that it was coerced. We disagree.

We review for clear error a trial court's factual findings regarding a motion to suppress a statement to the police, and we review de novo a trial court's ultimate decision on such a motion. *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Id.* Likewise, this Court will not reverse a trial court's decision regarding the voluntariness of a statement to the police unless we are left with a definite and firm conviction that a mistake was made. *Id.* at 352-353.

Defendant contends that her post-polygraph statement to the police was involuntary and coerced because of her mental and emotional condition. In determining whether a statement to the police was freely and voluntarily made, this Court reviews the totality of the circumstances surrounding the making of the statement. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). A court must consider a defendant's mental limitations and determine whether, "through susceptibility to surrounding pressures or inability to comprehend the circumstances," the defendant's confession was not the product of her own free will. *People v Belknap*, 146 Mich App 239, 241; 379 NW2d 437 (1985). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *People v Wells*, 238 Mich App 383, 388; 605 NW2d 374 (1999), quoting *Colorado v Connelly*, 479 US 157, 164; 107 S Ct 515; 93 L Ed 2d 473 (1986). Accordingly, there must exist "a substantial element of coercive police conduct," if a court determines that a confession is not "voluntary" within constitutional limitations. *Id.*, quoting *Connelly*, *supra* at 164, 167.

Here, a review of the record supports the trial court's determination that defendant's confession was not the result of police coercion. At a *Walker*² hearing, Sergeant Ingrid Dean testified that she conducted a polygraph examination of defendant followed by an interrogation during which defendant stated that she wanted to "clear this up." Defendant admitted that she was participating in counseling, is bipolar, and was taking Zoloft, Lamatol, and Strateria. According to Dean, defendant was cooperative and did not become emotional until after Dean informed her of the results of the examination. At that point, defendant began to cry. When Dean asked defendant whether this was the first occasion that she stole medication, defendant responded affirmatively. Dean described her own manner as "stern" but "not yelling." Defendant never asked to end the examination and did not indicate that she wanted to leave until the end of the process when she was permitted to leave.

Defendant admitted that she agreed to take the polygraph examination and that at that time she was participating in counseling for depression, anxiety, and post-traumatic stress disorder. According to defendant, Dean's attitude changed during the polygraph examination, and defendant felt that Dean was yelling at her. Dean also became very stern during the post-

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

polygraph interview when Dean told defendant that she was lying. Defendant testified that, in response, she withdrew, became very upset to the point that it was “almost out of control,” and asked to call her counselor. Although Dean permitted her to call her counselor, she chose to stay and continue to answer questions. Defendant testified that she became very emotional because she and Dean were sitting close together, Dean told her that she was lying, and Dean’s voice level was raised. Defendant admitted that she did not ask to end the process or to leave.

The testimony presented at the hearing fails to show any coercive police conduct. Rather, the evidence indicates that although defendant became emotional when informed that she did not pass the examination, she chose to stay and continue answering questions instead of ending the interrogation or calling her counselor. Defendant admitted that she was aware that she could have left, and admitted that Dean told her that she could leave. Further, defendant became emotional only after being informed that she did not pass the polygraph examination. In our view, informing defendant that she did not pass the polygraph test did not amount to the “substantial element of coercive police conduct” necessary for a constitutional violation. *Connelly, supra* at 164. Accordingly, we are not left with a definite and firm conviction that the trial court erred in determining that defendant’s statement to the police was voluntary. *Walters, supra* at 352-353.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot